Office - Supreme Court, U.S.
FILED
JUL 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-746

In the Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF AKRON

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC.

On Writ of Certiori to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE UNITED FAMILIES FOUNDATION AND WOMEN EXPLOITED IN SUPPORT OF PETITIONER, THE CITY OF AKRON

LYNN D. WARDLE
518 J.R.C.B.
Brigham Young University
Provo, Utah 84062
801/378-2617

Counsel for the Amici

No. 81-746

In the Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF AKRON

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC.

On Writ of Certiori to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE UNITED FAMILIES FOUNDATION AND WOMEN EXPLOITED IN SUPPORT OF PETITIONER, THE CITY OF AKRON

LYNN D. WARDLE
518 J.R.C.B.
Brigham Young University
Provo, Utah 84062
801/378-2617

Counsel for the Amici

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES v

INTERESTS OF THE AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. BEFORE SUBJECTING A PROPERLY ENACTED ABORTION REGULATION TO STRICT JUDICIAL SCRUTINY, A COURT MUST DETERMINE THAT IT SIGNIFICANTLY BURDENS OR SUBSTANTIALLY INFRINGES THE FUNDAMENTAL RIGHT OF ABORTION PRIVACY. 3

A. *A Determination That A Regulation Affecting Abortion Burdens Or Impinges Upon The Fundamental Right Of Abortion Privacy Must Be Made Before It Is Subjected To The Exacting Review Of Strict Judicial Scrutiny.* . 3

B. *An Abortion Regulation Is Subject To Strict Judicial Scrutiny Only After There Has Been A Clear Showing That It Seriously Restrains Or Obstructs A Woman's Constitutional Right To Choose To Terminate Her Pregnancy.* 7

II. THE SOCIO-LEGAL CONTEXT IN WHICH THIS CASE ARISES IS SIGNIFICANT. 10

A. *This Country Is Experiencing An Abortion Epidemic.* 10

B. *The Right of Abortion Privacy Is A Unique Right.* 13

C. *The Court Needs To Clarify General Principles For The Benefit Of The Lower Courts.* ... 13

PAGE

III. THE CONSTITUTION DOES NOT PROHIBIT LOCAL AUTHORITIES FROM TREATING EARLY ADOLESCENTS DIFFERNT FROM OLDER ADOLESCENTS BY REQUIRING THAT GIRLS ONLY FOURTEEN YEARS OLD OR YOUNGER OBTAIN PARENTAL OR JUDICIAL CONSENT FOR AN ABORTION. 14

A. *Regulations Restricting the Constitutional Rights of Minors Are Not Subject to Strict Judicial Scrutiny.* 14

B. *The Right of Abortion Privacy Does Not Extend to Immature Minors.* 15

C. *There Are Profound Differences Between The Maturity of Girls Fourteen Years Old or Younger, and Girls Sixteen or Seventeen Years Old.* 16

D. *Requiring Parental or Judicial Concent Before An Abortion is Performed on a Girl Fourteen or Younger Clearly Promotes Significant State Interests.* 17

IV. THE AKRON INFORMED CONSENT AND WAITING PERIOD REQUIREMENTS DIRECTLY PROMOTE COMPELLING GOVERNMENTAL INTERESTS CONCERNING THE WELFARE OF PREGNANT WOMEN. 22

A. *Abortion Entails Serious Risks For A Woman.* 23

B. *Anxiety About Abortion is Reduced if All Material Information Regarding Her Condition, The Alternatives, Consequences, And Risks Have Been Disclosed To The Woman.* . 24

C. *Failure To Make Complete Disclosure Heightens The Risk of Negative Postabortion Psychological Sequelae.* 25

PAGE

D. *Abortion Counselors And Clinics Are Caught in a Conflict of Interests That Inhibits Their Voluntarily Making Full Disclosure.* 26

E. *Requiring Disclosure of The Facts Of Fetal Development By A Physician And a Mandatory Cooling Off Period Are Essential To Protect A Woman's Right To Make An Informed Decision.* 27

V. CONCLUSION 29

CERTIFICATE OF SERVICE 30

TABLE OF AUTHORITIES
CASES

PAGE

Akron Center of Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, (6th Cir. 1981). 7, 17 27, 28

Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1179 (N.D. Ohio 1979). . 7

Aptheker v. Secretary of State, 378 U.S. 500 (1964). 4

Baird v. Department of Public Health, 599 F.2d 1098 (1st Cir. 1979). 8, 9

Bates v. City of Little Rock, 361 U.S. 516 (1960). . 4

Bellotti v. Baird (I) 428 U.S. 132 (1976)..... 5

Bellotti v. Baird (II), 443 U.S. 662 (1979)..... 5, 6 14, 15, 16, 17, 19, 22

Cantwell v. Connecticut, 310 U.S. 296 (1940). 4

Carey v. Population Services International, 431 U.S. 677 (1977). 4, 6, 10, 15

PAGE

Charles v. Carey, 627 F.2d 772 (7th Cir. 1980). ...

Colavtti v. Franklin, 439 U.S. 379 (1979)..... 27

Dandridge v. Williams, 397 U.S. 471 (1971)..... 8

Doe v. Bolton, 410 U.S. 179 (1973). 5

Eisenstadt v. Baird, 405 U.S. 438 (1972)..... 4, 8

Ferguson v. Skrupa, 372 U.S. 726 (1973)..... 8

Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963). 4

Griswold v. Connecticut, 381 U.S. 479 (1965). 4

Harris v. McRae, 448 U.S. 297 (1980). 6

H.L. v. Matheson, 450 U.S. 398 (1981) 6, 15, 23

Kramer v. Union Free School District, 395 U.S. 621 (1969). 4, 8

Maher v. Roe, 432 U.S. 464 (1977). ... 5, 6, 7, 8, 10, 13, 15

Meyers v. Nebraska, 262 U.S. 390 (1923)..... 18

Moore v. City of East Cleveland, 431 U.S. 494, (1977). 8

Parham v. J.R., 442 U.S. 584 (1979). 18

Pierce v. Society of Sisters, 268 U.S. 510 (1925).. 18

Planned Parenthood v. Danforth, 428 U.S. 52 (1976). 5, 7, 13, 14, 15, 16, 17, 22, 27

Roe v. Wade, 410 U.S. 113 (1973). 2, 3, 4, 5, 6, 7, 8 10, 13, 15, 27, 29

Shapiro v. Thompson, 394 U.S. 618 (1969). 4

Sherbert v. Verner, 374 U.S. 398 (1963)..... 4

Williamson v. Lee Optical, 348 U.S. 483 (1955).. 8

Zablocki v. Redhail, 434 U.S. 373 (1978). 4

STATUTES:

Ariz. Rev. Stat. § 8-107(B) (1974). 28

PAGE

Cod. Ord. of the City of Akron, § 1870.05(B).. 14, 15, 16, 29

Cod. Ord. of the City of Akron, § 1870.06. 29

Cod. Ord. of the City of Akron, § 1870.07. 29

Ill. Ann. Stat. Ch. 4 § 9.1-9(B) (Smith-Hurd 1975). 28

Ohio Rev. Code Ann. § 3107.8..... 28

Va. Code § 63.1-25 (1982)..... 28

OTHER AUTHORITIES

Alfidi, *Informed Consent* in Complications and Legal Implications of Radiologic Special Procedures (Meaney et. al. eds. 1973). 25

Alfidi, *Informed Consent,* 216 J.A.M.A. 1325 (1971). 25

Annas, G., The Rights of Hospital Patients (1975). 24, 35, 29

Auerback, *Abortions: Now It's Big Business* in Hearings on S. J. Res. 119 and S. J. Res. 130 *Before the Subcomm. on Constitutional Amendments of the Senate Committee on the Judiciary,* 93rd Cong., 2d Sess. 468 (1976). 26

Babikan and Goldman, *A Study in Teenage Pregnancy,* 128 Am. J. Psychiat. 775 (1971). 19

Barrett, Boehm & Killam, *Induced Abortion, A Risk Factor for Placenta Previa,* 141 Am. J. Obstet. Gynecol. 769 (1981)..... 23

Bates, L., Adolescent Rorsarch Responses: Developmental Trends From Ten to Sixteen Years, 8 (1959). 17

Bernard, H., Adolescent Development 175. 17

Bickel, A., The Morality of Consent 27 (1975). ... 14

Byrn, *An American Tragedy: The Supreme Court on Abortion,* 41 Ford. L. Rev. 807 (1973). 14

PAGE

Center for Disease Control, Annual Summary, 1978 (1980). 11, 12

Connor, *Liberal Abortion Law Proves to be a Bonanza for New York Doctors*, in *Hearings* on S. J. Res. 119 and S. J. Res. 130 *Before the subcomm. on Constitutional Amendments of the Senate Committee on the Judiciary*, 93rd Cong., 2d Sess. 470 (1976). 27

Cox, A., The Role of The Supreme Court in American Governemnt (1976). 14

Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973). 14

Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159 (1974). 14

Gessell, A., F. Ilg, and L. Ames, Youth: The Years from Ten to Sixteen (1956). 17

Goldstein, J., A. Freud, an A. Solnit, Before the Best Interests of the Child, (1979). 18

Goldstein, *Medical Care For The Child At Risk: On State Supervention of Parental Autonomy*, 86 Yale L. J. 645 (1977). 18

Harlap, Shiono, Ramcharan, Berendes & Pellegran, *A Proposed Study of Spontaneous Fetal Losses After Induced Abortions*, 301 New Eng. J. Med. 677 (1979). 23

Henshaw, Forrest, Sullivan & Tietze, *Abortion Services In The United States, 1979 & 1980*, 14 Fam. Plan. Perspectives 1 (1982). 11, 12, 18

Horrocks, J., The Psychology of Adolescence (4th ed. 1976). 17

Horowitz, *Adolescent Mourning Reactions to Infant Fetal Loss*, 59 Social Casework 551 (1978). 19, 20, 21

PAGE

Hurlock, E., Adolescent Development (4th ed. 1973). 16, 17, 18

Learner, G., and G. Spanier, Adolescent Development (1980). 17

Lembrych, *Fertility Problems Following Aborted First Pregnancy* in New Perspectives on Human Abortion 128 (T. Hilger, D. Horan, & D. Mall eds. 1981). 23

Levin, Schoenbaum, Monson, Subbelfield, & Ryan, *Association of Abortion With Subsequent Pregnancy Loss*, 243 J.A.M.A. 295 (1980). 23

Liebman & Zimmer, *The Psychological Sequelae of Abortion: Fact and Fallacy* in The Psychological Apects of Abortion 127 (D. Mall & W. Watts eds. 1979). 24, 25, 26, 27

Mccormack, *Record Number of Americans Going Under Knife*, Nexis (United Press International Nov. 28, 1981). 12

Nowak, J., R. Rotunda & J. Young, Handbook on Constitutional Law (Supp. 1982). 14

Perez-Reyes and Falk, *Follow-up After Therapeutic Abortion in Early Adolescence*, 28 Arch. Gen. Psychiat. 120 (1973). 20, 22

Rockwell & Pepitone-Rockwell, *The Emotional Impact of Surgery on the alue of Informed Consent*, 63 Med. Clin. of N. Am. 1341 (1979). 24, 25, 27

S. Rep. No. 97-465, 97th Cong., 2d Sess. 35 (1982). 23, 24, 26

Simm & Neisser, *Post-Abortive Psychoses: A Report From Two Centers* in The Psychological Aspects of Abortion 18 (D. Mall & W. Watts eds. 1979). 24

Smith, *Counseling For Women Who Seek Abortion* in Abortion: The Emotional Implication 75 (R. Kalmar ed. 1977). 25, 27

PAGE

Spaulding & Cavenar, *Psychasis Following Therapeutic Abortion,* 135 Am. J. Psychiat. 364 (1978)..... 24

Steinhoff, et. al., *Women Who Obtain Repeat Abortions: A Study Based On Record Linkage,* 11 Fam. Plan. Persp. 30 (1979)..... 22

Tietze, C., Induced Abortion: A World Review, 1981 (1981). 11

Teitze, *Repeat Abortions: Why More,* 10 Fam. Plan. Perspectives 286 (1978). 21

Wallerstein, Kurtz, and Bar-Din, *Psychological Sequelae of Therapeutic Abortions in Young Unmarried Women,* 27 Arch. Gen. Psychiat. 828 (1972). 19, 20

Wardle, L., The Abortion Privacy Doctrine (1981). 10 13, 16

Wardle, L., & M. Wood, A Lawyer Looks At Abortion (1982)..... 11, 14, 23, 27

Wattenberg, W., The Adolescent Years (2nd ed. 1973)..... 17

Williams, *Puberty and the Phases of Adolescence* in Adolescence: The Crisis of Adjustment, 27 (S. Meyerson, ed. 1975)..... 17

Willke, J., Handbook on Abortion 49 (1975). 24

Wood & Durham, *Counseling, Consulting & Consent: Abortion and the Doctor-Patient Relationship* 1978 B.Y.U. L. Rev. 783. 27

INTERESTS OF THE AMICI

United Families Foundation (UFF) is a non-partisan, non-profit research and education foundation associated with United Families of America, a nationwide organization established in 1977 with members in all 50 states and the District of Columbia. UFF was organized in part, to "educate the general public so that all will appreciate more fully the value of maintaining the family unit as the bedrock and strength of this nation, and [to] defend [the family] from all assaults that tend to fragment or weaken [it]."

As parents of young adolescents, many members of UFF are directly interested in seeing that laws preserving their right to protect their children against individuals and businesses that would exploit troubled teenagers are upheld. They also are directly interested in seeing that laws protecting a pregnant woman's right to full disclosure are upheld.

Women Exploited is an association of women who have been through the experience of abortion and who are dedicated to "raising the consciousness of their communities regarding the emotional and physical sequelae of abortion." Twenty-two chapters of Women Exploited have been established nationwide since 1975.

Women Exploited has been organied by and for women who have been exploited by the callous, profit-oriented practices of abortion industry workers whose financial interests in and philosophical zeal for abortion override their concern for the individual plights of the women who come to them—often in great distress—for counsel and assistance with a profound personal crisis. Member of Women Exploited are deeply and personally interested in seeing that vulnerable women—their pregnant sisters throughout America—are given all of the facts about abortion, alternatives and consequences, and are given time to consider those facts before being rushed by self-satisfied abortion counselors into the operating room to submit to an abortion.

The written consent of all the parties to the filing of this brief has been obtained and has been filed with the Clerk of the Court under separate cover.

SUMMARY OF ARGUMENT

This case comes before the Court in a unique and sensitive context. Since this Court constitutionalized the right to abortion in *Roe v. Wade*, U.S. 113 (1973), abortion has reached epidemic proportions in the United States. More than 1.5 million abortions are performed annually; one-third of these are performed on teenagers (including more than 15,000 abortions annually performed on girls age 14 and younger); and one-third of the total number of abortions annually are performed on women (including many teenagers) who previously have had one or more abortions. Abortion in the United States has become, in the last decade, just another (ho-hum) method of birth control.

At the same time, there is a growing body of scientific data that casts serious doubt on previous assumptions regarding the relative safety of abortions. Compelling evidence indicates that abortion involves significant risk for a woman's physical health, especially her future reproductive capacity, that are not associated with childbirth. Evidence of serious and widespread psychological sequelae now exists. At the same time, reports have surfaced all over this country, and studies have verified, that many women who have had abortions feel that they were mislead, misinformed, or uninformed about what an abortion entails, the facts of prenatal development, the physical and emotional consequences of abortion, the alternatives available to them, etc.

Perhaps the most important determination which the Court will make in this case will be its clarification of the mode and standard of judicial review that are required under the Due Process Clause of the Constitution to be applied to abortion regulations. The courts below, especially the Court of Appeals, failed to appreciate that abortion regulations (like Akron's limited parental consent restriction, informed consent provision, and waiting period requirement) which do not significantly burden or interfere with the woman's private right to choose and obtain abortion, are not subject to strict judicial scrutiny.

Akron's parental consent provision, limited to early adolscents, 14 years old or younger, is clearly distinguishable from the blanket parental consent provisions invalidated by this Court in other cases. There is unanimous agreement among child

development experts that the judgmental and other capacities of 13 and 14 year olds is profoundly different than that of older adolescents.

It is impossible to make a voluntary choice in ignorance and haste. Akron's informed consent requirements are necessary to insure that pregnant women receive full disclosure of all material information relating to their abortion decisions. Abortion counselors and clinics are not voluntarily making full disclosure. The Akron provisions are consistent with this Court's prior rulings regarding adequate counseling and informed consent.

Abortion involves the disestablishment of a developing parent-child relationship. Many women have gone to incredible extremes to recover custody of children they precipitously agreed to release for adoption. There is a compelling need for local authorities to ensure that a woman considering abortion is fully advised of the alternatives and consequences, and that she has time to consider her alternatives before taking the irrevocable step of destroying her unborn child *in utero*.

ARGUMENT

I. BEFORE SUBJECTING A PROPERLY ENACTED ABORTION REGULATION TO STRICT JUDICIAL SCRUTINY, A COURT MUST DETERMINE THAT IT SIGNIFICANTLY BURDENS OR SUBSTANTIALLY INFRINGES THE FUNDAMENTAL RIGHT OF ABORTION PRIVACY.

A. *A Determination That A Regulation Affecting Abortion Burdens Or Impinges Upon The Fundamental Right Of Abortion Privacy Must Be Made Before It Is Subjected To The Exacting Review Of Strict Judicial Scrutiny.*

Perhaps the most significant and far-reaching determination which the Court will make in this case will be its clarification of the appropriate standard and process of judicial review under the Due Process Clause as applied to abortion regulations. This has been a subject of confusion and source of error for the lower courts for nearly a decade.

In *Roe v. Wade*, 410 U.S. 113 (1973) the Court identified a new

"fundamental right." But in so doing, the Court did not suggest (nor has it ever suggested) that this right is entitled to greater judicial protection than other fundamental rights. Accordingly, before a court undertakes to subject a duly enacted abortion regulation to rigorous examination under the standard of strict judicial scrutiny, it must make the threshold determination that the law involved burdens or infringes upon the constitutionally protected fundamental right.

This approach has been followed by the Supreme Court for many years in cases dealing with other fundamental rights. See, e.g., *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 545 (1963) ("infringe significantly"); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) ("significant encroachment"). In cases dealing with other aspects of the right of privacy this Court has clearly demonstrated that strict judicial scrutiny will only be triggered when the government enactment "significantly interferes with," *Zablocki v. Redhail*, 434 U.S. 373, 383, 388 (1978) or "significantly burdens," *Carey v. Population Services International*, 431 U.S. 677, 689 (1977), that fundamental right.

This approach has been consistently followed and clearly directed by this Court in its abortion decisions. In *Roe* the Court explained the standard of judicial review that would apply as follows: "Where certain 'fundamental rights' are involved, the Court has held that *regulations limiting these rights* may be justified only by a compelling state interest. . . ." 410 U.S. at 155. As authority for this statement, the Court cited seven prior decisions. In each of those cases the regulation that was subjected to strict scrutiny completely denied, *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Griswold v. Connecticut* at 381 U.S. 479 (1965), "substantially infringe[d]," *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), "materially impair[ed]," *Eisenstadt v. Baird*, 405 U.S. 438, 446, (1972), "severely restrict[ed]," *Aptheker v. Secretary of State*, 378 U.S. 500, 507 (1964), "unduly infringe[d]," *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940), or severely "penalize[d] the exercise of," *Shapiro v. Thompson*, 394 U.S. 618 (1969) the fundamental right involved.

Justice Stewart, concurring in *Roe*, emphasized that a determination of infringement must precede application of the strict standard of judicial scrutiny when he wrote, "[I]t is difficult to

imagine a more complete abridgement of a constitutional freedom than that worked by the inflexible criminal statute now in force in Texas. *The question then becomes* whether the state interests advanced to justify this abridgement can survive the 'particularly careful scrutiny' that the Fourteenth Amendment here requires." 410 U.S. at 170 (Stewart, J., concurring) (emphasis added). *See also Doe v. Bolton*, 410 U.S. 179, 197, 198 (1973).

In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the spousal consent requirement invalidated by the Court under the standard of strict scrutiny was characterized as giving husbands an absolute "veto" power over a woman's decision. 428 U.S. at 68, 74, 75. A saline amniocentesis prohibition was attacked, because it would "preclude virtually all abortions in the first trimester." 428 U.S. at 76. On the other hand, recordkeeping requirements apparently were not examined under the rigorous standard because they were "not abused or overdone" and had "no legally significant impact or consequences on the abortion decision." 428 U.S. at 81. *See also Bellotti v. Baird (I)*, 428 U.S. 132, 147 (1976) ("unduly burdens").

In *Maher v. Roe*, 432 U.S. 464 (1977), the Court began its analysis by observing that "[t]he central question in this case is whether the regulation 'impinges upon a fundamental right explicitly or implicitly protected by the Constitution.'" 432 U.S. at 471. The Court explained that limitations upon the public funding of abortions were not subject to strict judicial review. The abortion prohibitions involved in *Roe* were described, constrastingly, as "a complete abridgement," a "sweeping restriction" and "a stark example of impermissible interference with the pregnant woman's decision to terminate her pregnancy." 432 U.S. at 472. In other cases the Court had invalidated, under strict scrutiny, "other types of restrictions, *different in form but similar in effect* on the woman's freedom of choice." 432 U.S. at 473 (emphasis added). *See also* 432 U.S. at 481 (Burger, C.J., concurring).

In *Bellotti v. Baird (II)*, 443 U.S. 662 (1979), the plurality noted: "The question before us—in light of what we have said in the prior cases—is whether [the challenged abortion regulation] does not unduly burden the right to seek an abortion." 443 U.S. at 640 (opinion of Powell, J.). *See also* 443 U.S. at 654, 655

(Stevens, J., concurring).

In *Harris v. McRae,* 448 U.S. 297 (1980) the Court emphasized the need to begin its analysis with an examination of whether the regulation involved infringed a fundamental right. "*We address first* the appellee's argument that the Hyde Amendment by restricting the availability of certain medically necessary abortions under Medicaid *impinges* upon the 'liberty' protected by the Due Process Clause recognized in *Roe* . . . and its progeny." 448 U.S. at 312 (emphasis added). Concluding that it did not, the Court declined to subject the Hyde Amendment to strict scrutiny.

Finally, in *H.L. v. Matheson,* 450 U.S. 398 (1981), the Court began its analysis by first addressing the appellant's contention that "the statute violates the right to privacy recognized in our previous cases." 450 U.S. at 407. Justice Stevens added: "The fact that a state statute may have some impact upon a minor's exercise of his or her rights *begins, rather than ends, the constitutional inquiry.* Once the statute's impact is identified, it must be evaluated in light of the State's interests underlying the statute." 450 U.S. at 421 (Stevens, J., concurring) (emphasis added).

If the plain language and example of this Court's abortion decisions is not enough, the explicit analysis of the Court in *Carey v. Population Services International* settles the question unequivocally. There, after reviewing the abortion decisions, the Court observed: "The significance of these cases is that they establish that the same test must be applied to state regulations *that burden an individual's right to decide* to prevent contraception or termination of pregnancy *by substantially limiting access to the means of effectuating that decision* as is applied to state statutes that prohibit the decision entirely. Both types of regulations 'may be justified only by a compelling state interest. . . .'" 431 U.S. at 688 (emphasis added).

Occasional statements by the Court that abortion statutes are unconstitutional "because" they are unduly burdensome *see e.g., Maher,* 432 U.S. at 473; *Bellotti* (II), 443 U.S at 640, have only been a shorthand way of indicating that they are inadequately justified under the strict standard of judicial review that is required of statutes that unduly burden a woman's right of

privacy. The Court has been speaking elliptically, much the same way that judges and lawyers speak of statutes being unconstitutional because they "restict free speech" when what is meant is that the statutes are unconstitutional because they are unjustified by the type of compelling state interests and narrow draftsmanship that are required under the exacting standard of judicial scrutiny applied to laws that interfere with First Amendment freedoms.

B. *An Abortion Regulation Is Subject To Strict Judicial Scrutiny Only After There Has Been A Clear Showing That It Seriously Restrains Or Obstructs A Woman's Constitutional Right To Choose To Terminate Her Pregnancy.*

The major disagreement between the Court of Appeals below and the District Court regarding the standard of judicial review centered upon *how* the standard should be applied, not what the standard is. The District Court concluded that the requirement that a doctor disclose to the woman the particular risks of the abortion in her case and provide her with instructions for her post-abortion recovery, and the requirement that an abortion not be performed until the passage of 24 hours after a woman has been apprised of that information, did not unduly burden or significantly interfere with a woman's constitutional right to choose. *Akron Center for Reproductive Health, Inc. v. City of Akron*, 479 F. Supp. 1172, 1198-1200 (N.D. Ohio 1979). The Court of Appeals disagreed. *Akron Center for Reproductive Health, Inc. v. City of Akron*, 651 F.2d 1198, 1203-04 (6th Cir. 1981).

The disagreement between these two courts illustrates a need for this Court to clarify *how much or what degree of restriction* or regulation triggers strict judicial scrutiny. As Judge Kennedy of the Court of Appeals noted, a label such as "undue burden" does "no more than state a conclusion, it is not helpful in *reaching* a conclusion." 651 F.2d at 1231 n. 2 (Kennedy, J., dissenting in part.)

It is crystal clear from this Court's prior decision that an *absolute* denial of the right to choose an abortion triggers strict judicial scrutiny. *Roe*, 410 U.S. at 170 (stewart, J., concurring); *Planned Parenthood*, 428 U.S. at 68, 74; *Maher*, 432 U.S. at 472, 473. What is not clear is how close to a total prohibition the

regulation must be before the exacting standard of strict judicial scrutiny is triggered.

One way to clarify this matter is to reiterate the underlying presumptions. It is well established that properly adopted local regulations concerning matters of economic and social welfare come before the courts with the presumption of constitutionality. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (opinion of Powell, J.); *Dandridge v. Williams*, 397 U.S. 471 (1971); *Ferguson v. Skrupa* 372 U.S. 726 (1973); *Williamson v. Lee Optical* 348 U.S. 483 (1955); J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 67 (Supp. 1982).

A "presumption of constitutionality [is] afforded state statutes and traditional approval [is] given state classification if the Court can conceive of a 'rational basis' for the distinction . . . . " *Kramer*, 395 U.S. at 627, 628; *see also Eisenstadt*, 405 U.S. at 447 n. 7. This presumption is, of course, a rebuttable presumption. But until it is rebutted, it is valid and effectively shields the state from the onerous duty of satisfying (and the courts from the sensitive and risky task of applying) the exacting standards of strict judicial scrutiny.[1]

In the context of abortion, it is *especially* important that the courts require a showing of infringement or burden before subjecting the abortion regulations to strict judicial scrutiny. The decision of the First Circuit Court of Appeals in *Baird v. Department of Public Health*, 599 F.2d 1098 (1st Cir. 1979), illustrates and explains this well. In that case, the Court of Appeals reversed

---

[1]Another way of clarifying this matter is to distinguish between substantive and procedural regulation. The Supreme Court in *Roe* and its progeny has established that a state cannot adopt an exclusively anti-abortion substantive policy, "imposing its will by force of law" or by "government compulsion." *Maher*, 432 U.S. at 473, 476. But it can adopt procedural regulations restricting the way in which the substantive choices are implemented. Monopolistic substantive positions are subjected to strict judicial scrutiny, while procedural restrictions are not. Thus, a "complete abridgement" of the right to choose to terminate a pregnancy is impermissible, *Roe*, 410 U.S. at 170. But regulations which merely encourage alternative activities are not. *Maher*, 432 U.S. at 476. Unless the "sheer burden" of the procedural impediments makes them "similar in effect" to the exclusive substantive restriction, *Maher*, 432 U.S. at 473, procedural regulations will not be subject to strict judicial scrutiny.

a district court injunction against application of a Massachusetts clinic licensure law and regulations to first-trimester abortion clinics. The factual basis for the injunction was very scant.

> [N]o evidence was introduced as to the impact of these regulations on the ability of the facility to carry out its mission. Specifically, there was no evidence as to . . . compliance with all the licensure provisions would be so burdensome as to affect the availability of abortions . . . . Nor was there any evidence as to whether the provisions were reasonable health regulations . . . . Plaintiffs' position, which was accepted by the district court, is that such evidence is not required; the constitutional infirmity, they argue, stems from the very application of regulations of this type to first trimester abortions and is apparent from their face.

599 F.2d at 1100.

The Court of Appeals disagreed, emphasizing that the failure of the plaintiff's to produce evidence that the regulations had a prejudicial impact upon the fundamental right of privacy was fatal.

> Without evidence that the regulations are unreasonable in terms of protecting the public health and safety or that they will impact in some legally significant manner upon the availability of abortions, we cannot draw plaintiffs' conclusions . . . When confronting broadly-based, facially neutral regulations of this type, *a lay tribunal lacks both the knowledge and expertise to evaluate the question of burdensomeness on its own; evidence, including expert evidence, would be essential for this purpose. In the absence of such evidence, we can only assume that the regulations reflect a proper, and in the case of abortions, non-excessive exercise of the state's power to safeguard the general health, safety and welfare.*

559 F.2d at 1102.

Thus, as explained in one tretise on this subject:

> The threshold question that arises in legal analysis under the doctrine of abortion privacy is whether the challenged regulation unduly burdens the right of abortion privacy. The question of burdensomeness is a question of fact. The party challenging the regulation carries the burden of producing

> evidence showing that the challenged regulation infringes on the fundamental constitutional right. The state need not prove that the regulation does not burden the right of privacy. The law presumes the validity of the regulation and that presumption relieves the state of any duty to establish "non-burdensomeness" of a challenged regulation in the absence of any actual evidence of such a burdensome impact.

L. Wardle, The Abortion Privacy Doctrine 309 (1981). *See also id.* at 4, 42, 44.

Thus, to justify the application of strict judicial scrutiny more than passing difficulty or mere inconvenience must be shown. Only *"direct State interference* with the protected activity" triggers application of strict judicial scrutiny. *See Maher* 432 U.S. at 474, 477 n. 10. The fundamental right involved is the right to personally choose and effectuate abortion, *Roe* 410 U.S. at 153; *Maher,* 432 U.S. at 472-74; the regulation must curtail *that.* Thus, if the regulation creates excessive or inordinate hardship on access to abortion services, if it effectively destroys the volition of the woman, if it substitutes the will of the state for the will of the woman, if it deprives the woman of her right to choose, then the regulation will be subject to strict judicial scrutiny. Otherwise it will not. In short, only if the regulation is either "a complete abridgement" or "different in form *but similar in effect* on the woman's freedom of choice" will it be subject to strict judicial scrutiny. *Maher,* 432 U.S. at 473; *Carey,* 431 U.S. at 689; L. Wardle, *supra* at 309.

II. THE SOCIO-LEGAL CONTEXT IN WHICH THIS CASE ARISES IS SIGNIFICANT.

A. *This Country Is Experiencing An Abortion Epidemic.*

Since the Supreme Court declared that pregnant women have a right to abortion on demand (at least before viability) the incidence of abortion in the United States has shot up to epidemic proportions. The number of abortions performed annually has risen every year since the Supreme Court decided *Roe v. Wade,*

as the following chart illustrates.[2]

Year	*Number of Reported Abortions (Rounded to nearest thousand)*	*Increase in Number Over Previous Year*	*Increase Over Previous Year (In percent)*
1972	587,000		
1973	745,000	157,000	27
1974	899,000	154,000	21
1975	1,034,000	135,000	15
1976	1,179,000	145,000	14
1977	1,317,000	137,000	12
1978	1,410,000	93,000	7
1979	1,498,000	88,000	4
1980	1,554,000	56,000	2

In the eight years, 1973-1980, more than 9.6 million abortions were *reported* in America.

The most recent complete and generally available data on abortion in America is for the year 1980.[3] That year there were over 1.55 million reported abortions in the United States. Accounting for the unreported abortions, the number of actual abortions performed in America that year was approximately 1.63 million.[4] Abortion is now the most frequently performed operation in the

---

[2]Henshaw, Forrest, Sullivan & Tietze, *Abortion Services In The United States, 1979 & 1980*, 14 Fam. Plan. Perspectives 1, 6, Table 1 (1982) [hereinafter "Henshaw"]. The figures for and the number of abortions performed in 1972 were taken, and the numerical and percentage increases in 1973 were derived, from Center For Disease Control Abortion Surveillance, Annual Summary, 1978, at Table 1 (1980). *See* L. Wardle & M. Wood, A. Lawyer Looks At Abortion 7-9 (1982).

[3]The most comprehensive and readily available statistics on abortion are compiled by the Alan Guttmacher Institute and published in Family Planning Perspectives. The Center for Disease Control publishes abortion statistics also, but the C.D.C. database is not as complete as the A.G.I. database. Some C.D.C. abortion reports have been 15% under-inclusive. *See* C. Tietze, Induced Abortion: A World Review, 1981, at 19-26 (1981).

[4]Henshaw, *supra* note 2, at 7. The authors of this article noted that their studies indicated that the number of abortions actually performed may be from 3-6% higher than the number reported. *Id.*

United States (triple the number of toncillectomy operations). [5] The number of abortions performed every year now exceeds the population of at least 16 states.

The ratio of abortions to known pregnancies was 300/1000 in 1980. That means that of every 1,000 known pregnancies (pregnancies that resulted in either a live birth or a reported abortion) in 1980, three hundred (or 30 percent) were terminated by abortion. Henshaw, *supra* note 2, at 6, Table 1. In some areas of the country, e.g., New York City and Washington, D.C., there are more abortions reported annually than live births. Center for Disease Control, Annual Summary, 1979 at 103 (1980). About one-third of all abortions are obtained by teen-age girls; women ages 20 to 24 obtain about another third.[6] Abortion ratios are higher for teen-age girls than any other age group of women.

The number and percentage of abortion repeaters have risen every year. Nearly one-third of the abortions in 1978 were performed on women who previously had one or more abortion. Henshaw, et. al., *supra* note 6, at 17, 18, Table 10.

Over 2,750 "facilities" performed abortions in 1980. Sixteen percent of these abortion providers performed 1,000 or more abortions that year. These large-volume abortion facilities ("abortion mills") performed more than 75% of all abortions in 1980. Henshaw, *supra* note 2, at 12, Table 6.

Almost ninety-one percent of all abortions are performed during the first trimester of pregnancy. About eight percent are performed between the thirteenth and twentieth weeks, and over one percent are performed after viability. *See* Henshaw, et. al., *supra* note 6, at 17, 18, Table 10.

---

[5]*See supra* note 2, and accompanying text; McCormack, *Record Number of Americans Going Under Knife*, Nexis (United Press International Nov. 28, 1981). In fact, the UPI Health editor reported that in 1979 the number of abortions done by dilation and curettage alone exceeded the number of every other type of surgical procedure except biopsy. *Id.*

[6]The latest A.G.I. report on the characteristics of women undergoing abortin is for 1978. Henshaw, Forrest, Sullivan & Tietze, *Abortion In The United States, 1978*, 13 Fam. Plan. Perspectives 1, 17, 18, Tables 10 & 11 (1981) [hereinafter "Henshaw, et. al."].

B. *The Right of Abortion Privacy Is A Unique Right.*

It is important not to lose sight of the unique nature of the right involved and the activity protected. Virtually every abortion involves the destruction of human life *in utero*. The right of abortion privacy is not like just any old right, or even any old fundamental right; it is simply not a fungible thing. Because a woman "carries an embryo, and, later a fetus," abortion "is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education . . . ." *Roe*, 410 U.S. at 159. In this context, some regulations, e.g., waiting period requirements, informed consent provisions, and parental consent for immature adolscent requirements, assume a unique role they would not have if applied to other fundamental rights such as the freedom of speech, the freedom of religion, voting, etc. Indeed, the Court was recognized this before. In *Bellotti (I)* the Court emphasized that "not all distinctions between abortions and other procedures are forbidden." 428 U.S. at 149. And in *Maher*, the Court observed "the simple answer to the argument that similar regulations [requiring prior written request and prior written approval for reimbursement] are not imposed for other medical procedures is that such procedures do not involve the termination of potential life." 432 U.S. at 480.

C. *The Court Needs To Clarify General Principles For The Benefit Of The Lower Courts.*

At issue in the case before the Court, are conflicting perceptions of general, guiding principles of constitutional law. It is important to keep that in mind because the technical detail of the Akron Ordinances makes this case unique, in many respects. For this Court to write a technical opinion in which the decision of the Court were justified only in terms of the details of this regulation or the unique facts of this case would not contribute to the clarification of the law. Indeed, many of the problems that have arisen as the lower courts have struggled to apply the doctrine of abortion privacy— the inconsistency of some of their opinions and the extremism of some of their results—can be traced to their attempt to read generalities into results that were justified in terms of a particularly narrow set of facts involved in one of the Supreme Court abortion decisions. L. Wardle, *supra* at 308.

Ambiguity about the principles of law underlying this Court's decisions in the abortion cases has made it difficult for the lower courts to give consistent, principled analysis in the abortion cases that have come before them. The resulting departure from accepted standards of judicial analysis, decision making, and opinion writing have been widely noted and criticized. *See e.g., id.,* at xi-xiii; L. Wardle & M. Wood, A Lawyer Looks At Abortion 164-65 (1982); A. Cox, The Role of the Supreme Court of American Government 53 (1976); A. Bickel, The Morality of Consent 27-29 (1975); J. Nowak, et. al., *supra at* 630, 631 (1978); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 Yale L.J. 9 20 (1973); Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases,* 1973 Sup. Ct. Rev. 159 (1974); Bryn, *An American Tragedy: The Supreme Court on Abortion,* 41 Ford. L. Rev. 807 (1973).

III. THE CONSTITUTION DOES NOT PROHIBIT LOCAL AUTHORITIES FROM TREATING EARLY ADOLESCENTS DIFFERENT FROM OLDER ADOLESCENTS BY REQUIRING THAT GIRLS ONLY FOURTEEN YEARS OLD OR YOUNGER OBTAIN PARENTAL OR JUDICIAL CONSENT FOR AN ABORTION.

Neither court below analyzed Akron's carefully limited parental consent provision under any standard of scrutiny for constitutionality. Instead, the "analysis" of both courts was limited to noting that § 1870.05(B) of the Codified Ordinances of The City of Akron bears some similarity to abortion regulations invalidated in *Planned Parenthood* and *Bellotti (II),* and peremptorily concluding that it is unconstitutional also. This superficial examination—guilt by association—led the lower courts to an erroneous conclusion. In fact there are profound difference between §1870.05(B) and the Missouri and Massachusetts provisions, and any fair analysis will vindicate the constitutionality of § 1870.05(B).

A. *Regulations Restricting the Constitutional Rights of Minors Are Not Subject to Strict Judicial Scrutiny.*

Because of the special conditions and disabilities of minority, statutes restricting the exercise of fundamental constitutional rights by minors are subject to a less demanding standard of scrutiny than statutes restricting the exercise of the same rights

by adults. *Planned Parenthood*, 428 U.S. at 74; *Bellotti* (II), 443 U.S. at 633, 634. In *Carey v. Population Services International*, Justice Brennan explained that a statute burdening the fundamental privacy rights of a minor would be invalidated if the state failed to produce evidence ("more than a bare assertion") that the statute was "a *rational means* for the accomplishment of some *significant state policy* . . ." 431 U.S. at 696 (emphasis added).

> This test is apparently *less rigorous than the "compelling state interest" test* applied to restrictions on the privacy rights of adults . . . Such lesser scrutiny is appropriate both because of the States' greater lattitude to regulate the conduct of children. . . and because the right of privacy implicated here is "the interest in independence in making certain kinds of important decisions," . . . and the law has generally regarded minors as having lesser capability for making important decisions. . . .

431 U.S. at 693 n.15 (citatons omitted) (emphasis added).

Thus, even if the lower courts had determined that § 1870.05(B) infringed a fundamental right of 14 year old minors, they should have examined § 1870.05(B) under a middle standard of scrutiny.

B. *The Right of Abortion Privacy Does Not Extend to Immature Minors.*

In *Planned Parenthood* this Court invalidated a Missouri statute that required parental consent before an abortion could be performed on any unmarried woman under the age of 18. But the Court was careful to limit the scope of its holding in that case. "We emphasize that our holding . . . does not suggest that every minor, *regardless of age* or maturity, may give effective consent for termination of her pregnancy." 428 U.S. at 75. In *H.L.*, the Court reiterated this and emphasized: "There is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of abortion." 450 U.S. at 408. *See Planned Parenthood*, 428 U.S. at 105 (Stevens, J., dissenting in part).

The heart of the right of privacy articulated in *Roe* and its progeny is the ability to make an informed choice. The facts of pregnancy and its alternatives provide the setting in which the

right of privacy (choice) may be exercised. Exercise of the right of privacy depends upon the ability of the pregnant woman to comprehend her condition, the alternatives available to her, the consequences associated with each alternative, and on her capacity to exercise at least rudimentary cognitive and moral judgment. *See Planned Parenthood*, 428 U.S. at 67. If the pregnant woman lacks the capacity to understand the different alternatives, or to choose among them, it does not infringe upon her fundamental right of privacy (choice) for a law to require that some other person share in exercising that decision-making right. *See L. Wardle, supra* at 162-180. Thus, a statute preserving the joint decision-making authority of the parent of a pregnant immature girl considering the irreversible act of abortion is not unconstitutional. *Bellotti (II)*, 433 U.S. at 642; *See* 433 U.S. at 653-55 (Stevens, J., concurring).

C. *There Are Profound Differences Between The Maturity of Girls Fourteen Years Old or Younger, and Girls Sixteen or Seventeen Years Old.*

The parental consent provisions previously found unconstitutional by this Court applied indiscriminately to all minors, regardless of age or maturity. The Missouri law found unconstitutional in *Planned Parenthood* applied to all unmarried minor women who were below 18 years of age. 428 U.S. at 72, 85. Similarly, the Massachusetts judicial or parental consent scheme which was found to be unconstitutional in *Bellotti (II)* applied to all unmarried women under age 18. 443 U.S. at 625. However, the Akron ordinance is not a blanket parental consent requirement. Section 1870.05 only requires parental or judicial consent prior to the performance of an abortion on a girl 14 years of age or younger. And age, like maturity, is a distinction of constitutional significance. *Planned Parenthood*, 428 U.S. at 75.

It is not unreasonable for the law to presume that girls age 14 and younger who are pregnant are incapable of making an informed and mature decision regarding abortion without the supervision of a parent or judge. There are *exceptional* differences in judgment and capacity between early adolescent girls, age 14 and younger, and older adolescents, age 16 or 17.

The word "adolescent" comes from the Latin word meaning "to grow to maturity." E. Hurlock, Adolescent Development 2

(4th ed. 1973). Adolescence is a time of transition from the dependency of childhood to the independence of adulthood. "Guidance is essential if the transition is to be made successfully and with minimum psychological damage." *Id.* at 15. Unlimited freedom adds to the adolescent's already-present feeling of insecurity. *Id.* at 256.

Adolescence is a time of maturation, and adolescents in our culture go through many distinct stages of growth across a wide spectrum of personal development. It is universally recognized that there are *profound* differences between 13 and 14 year old adolescents and 16 or 17 year old adolescents with regard to moral development, intellectual development, personality development, physical development, cognitive development, self-concept, attitudes, beliefs, sex drives, interests, and dependence upon parents. *See* A. Gessell, F. Ilg, and L. Ames, Youth: The Years from Ten to Sixteen *passim* (1956); H. Bernard, Adolescent Development 175, 212, 250; Williams, *Puberty and the Phases of Adolescence* in Adolescence: The Crisis of Adjustment, 27, 29 (S. Meyerson, ed. 1975); J. Horrocks, The Psychology of Adolescence 32, 63-73, 92-96, 112-27, 251, 284, 291, 325; (4th ed. 1976); G. Learner and G. Spanier, Adolescent Development 22 (1980); L. Bates, Adolescent Rorsarch Responses: Developmental Trends From Ten to Sixteen Years, 8, 11, 288-96 (1959); W. Wattenberg, The Adolescent Years 15, 16 (2nd ed. 1973). There is overwhelming social science evidence that pregnant adolescent girls age 14 years or younger are in need of parental supervision especially regarding as profound a decision as whether or not to terminate a pregnancy.

D. *Requiring Parental or Judicial Concent Before An Abortion is Performed on a Girl Fourteen or Younger Clearly Promotes Significant State Interests.*

The Court of Appeals below noted that the plaintiff abortion clinic provides its services to girls as young as 12 years of age. 651 F.2d at 1201. The record in other cases reveals that girls as young as ten have sought abortions at clinics. *Planned Parenthood*, 428 U.S. at 72. In fact, approximately one percent of all abortions annually are performed on adolescents 14 years or younger—*i.e.*, more than 15,000 girls age 14 or younger obtaining

abortions *annually* since 1978. *See* Henshaw, et. al., *supra* note 6, at 17, Table 10.

The requirement of parental or judicial consent before the performance of abortions on girls this young satisfies the three needs that have traditionally justified the imposition of parental consent requirements upon minors. *Bellotti (II)* 443 U.S. at 634 (opinion of Powell, J.). First parental consent preserves a relationship that is essential to the well-being of early adolescents. The premature breaking or weakening of the bond between parents and adolescents can be very detrimental to the developmental well-being of the adolescent. "Court or agency intervention without regard to or over the objection of parents can only serve to undermine the familial bond which is vital to a child's sense of becoming and being an adult in his [or her] own right." Goldstein, *Medical Care For the Child At Risk: On State Supervention of Parental Autonomy,* 86 Yale L. J. 645, 650 (1977). *See further* J. Goldstein, A. Freud, and A. Solnit, Before the Best Interests of the Child, 101-06 (1979). Thus, the parental consent requirement is justified by "the importance of the parental role in childrearing." *Bellotti (II)* 443 U.S. at 634. *See further Meyers v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Parham v. J.R.,* 442 U.S. 584 (1979).

Second, the parental consent requirement insures that guidance and direction will come from an adult who has had, and who will continue for sometime to have, a custodial relationship with and concern for the child. As noted *infra* at 24, abortion is an exceptionally traumatic experience for adult women to cope with. Adolescents have a *particular* need for adult guidance in areas in which they have had no childhood experience to guide them. E. Hurlock, *supra* at 252. Ambivalence and confusion regarding the abortion decision are much greater for adolescents, generally, than they are for adult women, and they are even greater for younger adolescents than for older adolescents. *Id.*

One researcher reports:

> A decision to have an abortion was not an easy one . . . . One of the young women admitted getting off the table at the abortion clinic before the procedure began . . . .
>
> Attitudes about the acceptability of abortion also demon-

> strate the ambivalence of many [adolescents] who had abortions. Looking back to the time before the abortion, less than one-half approved of abortion at that time. . . . Less than one-quarter approved of it after the abortion.

Horowitz, *Adolescent Mourning Reactions to Infant and Fetal Loss*, 59 Social Casework 551, 557 (1981). *See further* Babikan and Goldman, *A Study in Teenage Pregnancy*, 128 Am. J. Psychiat. 755 (1971). Thus, the Akron Ordinance protects early adolescents against "their inability to make critical decisions in an informed, mature manner . . . ." *Bellotti (II)* 443 U.S. at 634.

Third, the requirement of parental consent protects very young minors against the profound consequences that follow a decision to have an abortion. Studies of adolescents reveal that the risk of emotional problems are even more severe for them than they are for adult women. One study reported that two-thirds of the adolescent pregnant patients "showed intense dependency needs." Babikian and Goldman, *supra* at 759 (1971). Another study reported that nearly one-third of the young women who had abortions

> showed moderate to considerable decline in psychosocial functioning five to seven months post-abortion as measured from the baseline of their reported adequate pre-pregnancy status. These young women, at initial follow-up, were suffering with a variety of specific symptoms of maladaptive behavior including *mild to moderate depressive episodes*, a variety of new *physical complaints* for which medical attention had not been sought, . . . *difficulty in concentrating* in school, *withdrawal* from previous social contacts, *lowered self-esteem* explicitly related to the pregnancy and abortion experience, a *newly begun promiscuous pattern in relationships with men*, and regression to more infantile modes of relatinships with parents. *These difficulties did not predate the pregnancy.*

Wallerstein, Kurtz, and Bar-Din, *Psychological Sequelae of Therapeutic Abortions in Young Unmarried Women*, 27 Arch. Gen. Psychiat. 828 (1972) (emphasis added). Adolescents with previous emotional difficulties "were found to be chronically distressed, in continued poor psychosociological health, and additionally burdened by the open, unassimilated pregnancy and abortion experience which they seemed unable to integrate." *Id.* at 831. The authors observed "that the young women in our

study have only a 50% chance of having mastered the pregnancy and abortion experience to the point of adequate closure and reconstruction of the previous state of psychosocial functioning at five to seven months post-abortion." *Id.* They concluded:

> Our single *most striking set of findings relates to the effects of the pregnancy and abortion experience upon the younger adolescents* in the 14-17 year age span. Consequent sympton manifestations, even when only transient, tended to be *more dramatic and more severe* in this younger group. . . . Even more, we were struck by the more *pervasive long-range effects* of the pregnancy and abortions experience upon these particular young women . . . . Overall it is clear that the pregnancy and abortion experience in the younger and less mature *is considerably heightened risk*, a point of potential major maturational skewing.

Id. at 832. (emphasis added). See also Perez-Reyes and Falk, *Follow-up After Therapeutic Abortion in Early Adolescence*, 28 Arch. Gen. Psychiat. 120, 124 (1973), and studies cited in Horowitz, *supra* at 553 n.10.

One of the particular difficulties for adolescents is the problem of dealing with the very real sense of loss after an abortion is performed.

> A major task of adolescence is the detachment from parental figures. There are similarities between the course of this separation and the mourning process [that follows abortion]. . . . 'Normal adolescent mourning,' as Max Sugar calls the process of separating from parental figures, makes adolescents vulnerable to other losses. Some loss of support to the adolescent ego and superego have already resulted from this process. With futher losses, the threat to an adolescent's identity can be strong.

Horowitz, *supra* at 552. Less than one-fourth of the adolescents

observed completed a healthy adaptive mourning process.[7]

Adolescents who do not fully address this emotional problem face greater risk of subsequent pregnancy. "They *tended to conceive again soon after the termination of the previous pregnancy.* Many of the young women showed few mourning reactions, perhaps because of a fear of being overwhelmed by their responses and because few others supported their expression of these feelings." *Id.* at 558 (emphasis added).

> Working through a loss is often a painful process, but failure to do so increases the likelihood that feelings about this loss will influence a young woman's feeling about herself, a subsequent child, and future separations and losses . . . . Working through a loss can be difficult, while becoming pregnant again may seem to be a simple solution.

Id. at 559. "Conceiving again at a median of . . . nine and one-half months for the Abortion Group suggest that many may have had difficulty accepting the previous loss. Twenty-five said that they purposely became pregnant again as a replacement of the previous loss. Thirteen did not admit planning the subsequent pregnancy, but avoided contraceptives even though they were aware of the consequences of doing so." *Id.* at 556.

This may explain the phenomenon of the rising incidence of repeated abortions.[8] One study showed that 17% of the women

---

[7]Horowitz, *supra* at 553.

> The young woman's initial period of shock and denial of the loss is normally followed by reactions such as fantasizing about the baby; expressing the need to see if it is possible to have another child; feeling guilty about her own role in the loss; feeling angry toward the hospital personnel, family, or the baby's father; and having somatic reactions. These responses are sometimes followed by a period of pain and despair, in which apathy is common. A teenager may show a lack of caring for herself and her future. This sometimes serves as punishment for her perceived role in the loss.

Id.

[8]In 1976 one-fourth of all abortions were repeat abortions. Teitze, *Repeat Abortions: Why More,* 10 Fam. Plan. Perspectives 286 (1978). In 1977 the percentage was even higher. The percentage of teenagers obtaining abortions who previously have had an abortion is estimated to be 5% for girls aged 15, and this figure rises by 5% with every age-year until 25% of the teenagers aged 19 having abortions have previously had one or more abortions. Teitze, *supra* 10 Fam. Plan. Perspectives at 205.

under 18 who had abortions were pregnant again within one year. Steinhoff, et al., *Women Who Obtain Repeat Abortions: A Study Based On Record Linkage*, 11 Fam. Plan. Perspectives 30, 37 (1979). Another study showed that 41% of adolescents who had therapeutic abortions had resumed sexual intercourse six months later, more than two-thirds of whom were then doing so without contraceptives. Perez-Reyes, et al., *supra* at 123.

Thus, the parental consent requirement for early adolescents of the Akron Ordinance is designed to prevent the exploitation of "the peculiar vulnerability of children . . . ." *Bellotti (II)*, 443 U.S. at 634. Clearly, the Akron Ordinance promotes significant governmental interests in families, parents, and children, and should be upheld.

IV. THE AKRON INFORMED CONSENT AND WAITING PERIOD REQUIREMENTS DIRECTLY PROMOTE COMPELLING GOVERNMENTAL INTERESTS CONCERNING THE WELFARE OF PREGNANT WOMEN.

Akron's informed consent and waiting period requirements do not significantly burden the fundamental right of abortion privacy. In this respect, the central question is not whether informed consent and waiting period requirements will reduce the likelihood that pregnant women will choose to have abortions, but whether or not the regulations inhibit the right of such women to make informed decisions "whether *or not*" to have an abortion. If a woman is not told of the facts of fetal development and the alternatives available to her ("the most significant consequences of the [abortion] decisions are not medical in character," *Planned Parenthood*, 428 U.S. at 103), of the proposed method of abortion and its particular risks for her, and if she is not protected against being rushed into a decision, it could not be said that her abortion was the result of the kind of deliverate personal choice that the constitutional right of privacy encompasses. Clearly, the Akron ordinances do not significantly interfere with the fundamental right to choose to terminate pregnancy. Moreover, even if a compelling state interest were required, the informed consent and waiting provisions would be constitutional because they are carefully drafted to effectuate compelling governmental interests in the health of pregnant women.

A. *Abortion Entails Serious Risks For A Woman.*

This Court has recognized that: "The medical, emotional, and psychological consequences of an abortion are serious and can be lasting . . . ." *H.L.*, 450 U.S. at 411. "Abortion is associated with an increased risk of complications in subsequent pregnancies." *H.L.*, 450 U.S. at 411 n.20. A subcommittee of the U.S. Senate has investigated, and rejected, the notion that abortion is generally safer than childbirth. S. Rep. No. 97-465, 97th Cong., 2d Sess. 35, 36, 39 (1982). "There is now compelling evidence that some severe, long-lasting medical complications occur more frequently following abortion than childbirth, as even some proabortion writers appear to acknowledge." L. Wardle & M. Wood, *supra* at 112. There is a clear correlation between abortion and future reproductive health problems for the woman. [9]

Equally important is the evidence of serious psychological consequences of abortion. It has long been recognized that most women make the decision to have an abortion with anxiety, ambivalence, and distress. But there is a growing evidence "that the ordinary feelings of distress and anxiety associated with abortion are only the tip of the iceberg." S. Rep. No. 97-465 at 41.

One psychologist testifying before a Senate subcommittee

---

[9] There is an undisputed correlation between abortion and future reproductive health problems for the woman. For example, a Boston study indicated that the risk of subsequent miscarriage rated from 2.3 to 3.3 times greater for women who had more than one abortion than for women who had one or none. Levin, Schoenbaum, Monson, Stubbelfield, & Ryan, *Association of Abortion With Subsequent Pregnancy Loss*, 243 J.A.M.A. 295 (1980). A California study suggested that women who had one abortion had 1.8 times greater risk of miscarriage in the next pregnancy than women who had no abortions, and women who had two or more abortions had 3.1 times greater risk of miscarriage. Harlap, Shiono, Ramcharan, Berendes & Pellegran, *A Proposed Study of Spontaneous Fetal Losses After Induced Abortions*, 301 New Eng. J. Med. 677 (1979). Doctors at Vanderbilt University recently reported finding a seven to fifteen-fold increase in placenta previa in women who have had first-trimester abortion (placenta grows across the womb; serious bleeding and risk of death formother and child if caesarean section not performed). Barrett, Boehm & Killam, *Induced Abortion: A Risk Factor for Placenta Previa*, 141 Am. J. Obstet. Gynecol. 769 (1981). *See also* Lembrych, *Fertility Problems Following Aborted First Pregnancy* in New Perspectives on Human Abortion 128 (T. Hilger, D. Horan, & D. Mall eds. 1981).

referred to 34 "different studies on psychological effects of abortion showing that 'the negative potential reactions span anxiety and depression to psychosis and suicide.'" S. Rep. No. 97-465, at 42.

The authors of one recent study declared: "We have produced evidence that abortion does precipitate severe mental illness, particularly in vulnerable women but by no means exclusively." Simm & Neisser, *Post-Abortive Psychoses: A Report From Two Centers* in The Psychological Aspects of Abortion, 18 (D. Mall & W. Watts eds. 1979). *See also* Spaulding & Cavenar, *Psychosis Following Abortion,* 135 Am. J. Psychiatry 364 (1979). Significantly recurring psychological sequelae identified by two other researchers include guilt, anxiety, depression, sense of loss, anger, change in relationship with boyfriend, crying, and feeling mislead by misinformation or lack of information. Liebman & Zimmer, *The Psychological Sequelae of Abortion: Fact and Fallacy* in The Psychological Aspects of Abortion, *supra* at 127, 131. The Council of the Royal College of Obstetrics and Gynecology in Great Britain reported in 1966: "The incidence of serious premanent psychiatric aftermath [from abortion] is variously reported as being from nine and 59%" Quoted in J. Willke, Handbook on Abortion 49, 50 (1975).

B. *Anxiety About Abortion is Reduced if All Material Information Regarding Her Condition, The Alternatives, Consequences, And Risks Have Been Disclosed To The Woman.*

One of the factors that heightens preabortion anxiety is uncertainty. Full disclosure alleviates this cause of anxiety. It also provides the attending physician with an opportunity to assess the mental state of the patient. "Discussion of the risks of surgery will reveal the level of anxiety of the patient about his or her illness and impending surgery." Rockwell & Pepitone-Rockwell, *The Emotional Impact of Surgery and The Value of Informed Consent,* 63 Med. Clin. of N. Am. 1341, 1344 (1979).

As a general rule, "The *more elective a procedure is, the more important full disclosure becomes.*" G. Annas, The Rights of Hospital Patients, 60 (1975) (emphasis in original). Most patients want more, not less, information. One study of 900 patients about to undergo angiography had patients review and sign a consent

form that "detailed a number of serious reactions, including possible loss of an organ, a death rate of four in 6,500, and the complication rate of one in 500." *Id.* at 62. Over 75 % of those surveyed considered the information useful, and over 70% either felt more comfortable or were not emtionally affected. *Id.* citing Alfidi, *Informed Consent* in Complications and Legal Implications of Radiologic Special Procedures (Meaney et. al. eds., (1973). *See futher* Alfidi, *Informed Consent,* 216 J.A.M.A. 1325 (1971) (smaller sample, similar results).

C. *Failure To Make Complete Disclosure Heightens The Risk of Negative Postabortion Psychological Sequelae.*

"How a woman copes with abortion will partially depend on her knowledge about the procedure and the attitudes and reactions of others. If abortion is discussed in *careful detail* as a medical procedure without disgust or shame, the woman can cope more effectively with the experience." Smith, *Counseling For Women Who Seek Abortion* in Abortion: The Emotional Implications 75, 82 (R. Kalmar ed. 1977) (emphasis added). Informed consent discussions "can reduce chances of a maladapted post-operative course."[10]

One of the frequently recurring psychological sequelae of abortion is that women "feel misled by misinformation or lack of information." Liebman & Zimmer, *supra* at 131. These authors reported:

> Ten women [of 58 constituting the sample study] felt misled by persons they went to for help after the abortion. Part of them felt they were given misinformation. Women were told their pregnancy was "like a fish," "like an acorn," or "only

---

[10]Rockwell, et. al., *supra* at 1342.

> [T]he informed consent discussions serve to provide three major ways that patients and physicians can reduce chances of a maladaptive post-operative course. First, discussion of the risk and benefit helps the patient prepare emotionally for a bodily-intrusive event. Second, allowing the patient to know what can be predicted post-operatively enhances the patient's sense of control. Maslow notes that what you do not know has power over you while knowledge brings control and choice. "'Ignorance makes choice impossible." . . . Finally, telling the patient how the physician and hospital staff will be helpful during the post-operative course will provide the patient with realistic expectations of the staff."

> tissue." When one woman voiced her concern at the clinic that the abortion might be killing, the counselor said: "Don't think of it as a killing. Think of it as taking blood out of your uterus to get your periods going again." When another called the clinic after the abortion to discuss her post-abortion emotional distress, she was told "only 2% of the women feel like this." Five in this category verbalized their dismay at the lack of information they were given. Women said they were upset because they were not informed of the possibility of miscarriage, of sterility, or of post-abortion emotions. In addition, two of them were resentful that they were not given alternatives.

Id. at 133.

The members of *Amicus* Women Exploited are living proof of the seriousness of this problem. Women across the country feel that they were misled, misinformed, and deceived by the lack of full disclosure regarding the facts of prenatal life and the emotional and physical sequelae of abortion. Often their experience surfaces long after the abortion in an overwhelming, traumatic fashion. *See* S. Rep. No. 97-465 at 42. Informed consent laws, like the Akron Ordinances, are designed to protect the rights of these women and their sisters for whom full disclosure may make a difference in deciding whether or not to have an abortion. Even if disclosure is redundant for some—even most—women seeking abortions, the Akron informed consent provisions are justified—indeed, essential—to protect the rights of more distressed or less informed women. (The fact that one-third of all abortions are performed on teenagers underscores the need for such "consumer protection" laws.)

D. *Abortion Counselors And Clinics Are Caught in a Conflict of Interests That Inhibits Their Voluntarily Making Full Disclosure.*

Most abortions are performed by individuals who are unknown to the woman and who are directly interested in the outcome of her decision regarding abortion. Abortion counselors and physicians often have a financial and emotional stake in persuading a woman to choose to have an abortion. *See e.g.*, Auerback, *Abortions: Now It's Big Business* in Hearings on S. J. Res. 119 and S. J. Res. 130

Before the Subcomm. on Constitutional Amendments of the Senate Committee on the Judiciary, 93d Cong. 2d Sess. 468 (1976); Connor, *Liberal Abortion Law Proves to Be a Bonanza for New York Doctors*, in *id.* at 470.

Abortion clinics are not voluntarily providing women with the kinds of information they need to make a careful and reasoned decision. *See* Wood & Durham, *Counseling, Consulting, & Consent: Abortion and The Doctor-Patient Relationship* 1978 B.Y.U. L. Rev. 783, 784. One study of 46 women who had abortions at one clinic revealed that 31 of them "either had no knowledge about abortion or were misinformed about the procedure." Smith, *supra* at 78. *See also* Liebman & Zimmer, *supra* at 131-133.

It is ironic that despite the tremendous protection afforded the abortion industry by the decisions of this Court, that industry has not responded to the Court's encouragement to take the responsibility to counsel patients seriously. The record in this case (651 F.2d at 1201) reveals that the nature and amount of counseling done by the plaintiff clinic is no better than that noted critically by Justice Steward more than five years ago. *Planned Parenthood*, 428 U.S. at 91 n.2 (Stewart, J., concurring).

E. *Requiring Disclosure of The Facts Of Fetal Development By A Physician And a Mandatory Cooling Off Period Are Essential To Protect A Woman's Right To Make An Informed Decision.*

In *Roe* the Court emphasized its expectation that "consultation" would occur between a woman and her physician during which time the abortion decision would be made. 410 U.S. at 153, 162, 163, 164, 166. Participation by the attending physician in the abortion decision was reiterated in later decisions as well. *Planned Parenthood*, 428 U.S. at 61. *Collautti*, 439 U.S. at 387.

Participation by the physician in the informed consent process is crucial. At the very least, the patient needs to have the opportunity to ask questions of her attending physician before making her decision regarding abortion. *See Rockwell* et. al., *supra* at 793, 830; L. Wardle & M. Wood, *supra* at 107-111.

Nevertheless, the practice of the plaintiff abortion clinic does not even come close to the model described by this Court. None of

the persons advising the woman regarding her abortion decision is a physician, and her first contact with the physician who is to perform the abortion "usually occurs when she is taken into the operating room." 651 F.2d at 1201.

Of course, to require the participation of a physician in the informing process could result in a slight increase in the cost of th abortion services. But there are more severe costs—both for the woman and for the constitutional ideal of informed consent—if physician participation in the decision-making stages does not occur.

A decision to have an abortion, made without knowledge of the facts of fetal development, could not under any stretch of the imagination be deemed an informed decision. In the absence of laws requiring the disclosure of the facts of fetal development, the clinic or doctor may be able to perform the obligation of informing the woman about abortion by describing the procedure as nothing more than the removal of a benign growth. To be sure, regulations that are unnecessarily punitive or that are clearly designed to increase the stress of the woman undergoing abortion (e.g., requiring her to view grossly explicit slides of dismembered aborted fetuses) would not be sustainable under any standard of judicial review. But to require that a woman be dispassionately informed about the facts of fetal development before deciding whether or not to have an abortion enhances, rather than interferes with, her right to make an informed decision.

A 24 to 48 hour waiting period requirement does not infirnge upon the fundamental right of privacy. The abortion decision, like the decision to release a child for adoption, *disestablishes a parent-child relationship.* That relationship is as sensitive and as powerful as any known to the law. The termination of that relationship historically has been subject to safeguards. Experience has shown that many a woman has changed her mind and gone to incredible lengths to recover a child she released for adoption. Many states, including Ohio, require that a woman wait at least 72 hours after the birth of a child before giving a valid consent to adoption. Ariz. Rev. Stat. § 8-107(B) (1974); Ill. Ann. Stat. ch. 4 § 9.1-9(B) (Smith-Hurd 1975); Ohio Rev. Code Ann. § 3107.8 (page 1980). In Virginia, consent for adoption cannot be given until the child is at least ten days old. Va. Code § 63.1-25 (1982). Of course, after an

abortion a woman who changes her mind cannot recover her child. Thus, there is compelling justification for a law which establishes a 24 or 48 hour "cooling off period" before a decision to have an abortion is implemented.

V. CONCLUSION

For nearly a decade, the abortion decisions of this Court have been the subject of great controversy. Not only has there been widespread public misunderstanding of the decisions, but within the federal judiciary they have been misunderstood. While the opinions of this Court have drawn some very subtle distinctions, it is apparent that the lower courts have been much more impressed by what they think the Court is doing (invalidating most abortion regulations) than by what the Court has been saying (about finding that the fundamental right to choose is really burdened before applying strict scrutiny).

The Akron ordinances were adopted more than five years after *Roe v. Wade* was decided by this Court. Drawing upon a half-decade of judicial construction of the right of abortion privacy—including six subsequent abortions opinions of this Court—the Akron ordinances were carefully, painstakingly drafted to comply with the principles of constitutional law that those decisions established. The Akron ordinances were designed to regulate abortion practice without restricting choice, to assert strongly held, important governmental interests without interfering with a woman's right to decide whether or not to have an abortion.

The decision of the Court of Appeals invalidating the limited parental consent requirements, the informed consent provisions, and the brief waiting period requirement failed to properly apply the standard of constitutional review established by this Court, and the judgment holding sections (1870.05(B), 1870.06, and 1870.07 unconstitutional should be reversed.

Respectfully submitted,

Lynn D. Wardle
Counsel for Amici
United Families Foundation
and Women Exploited

CERTIFICATE OF SERVICE

State of Utah)
) ss
County of Utah)

I, Lynn D. Wardle, counsel for the *amici curiae*, being a member of the Bar of the Supreme Court of the United States, do hereby certify that all parties required to be served have been served with three copies of this brief by depositing the same in a United States Post Office with first class postage prepaid, addressed to:

Robert D. Pritt
Director of Law
304 Municipal Bldg.
Akron, Ohio 44308
Counsel of Record for Petitioners

Stephen Landsman
Cleveland-Marshall College of Law
Cleveland State University
Cleveland, Ohio 44115
Counsel of Record for Respondents

Alan Segedy and Robert Destro
40 East Mill Street
Akron, Ohio 44301
Counsel for Intervenor

Signed this 9th day of July, 1982.

LDW

Lynn D. Wardle
518 JRCB
Brigham Young University
Provo, Utah 84602
801/378-2617